Supreme Court, U.S.
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Case No. _____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Bentura Martinez,

Petitioner,

vs.

State of Wisconsin,

Respondent

On Petition for Writ of Certiorari
To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the identification evidence of Bentura Martinez have been admitted at trial when the identification procedures were both impermissibly suggestive and unreliable under the totality of the circumstances as the petitioner was the only minority in the photo array?

2. Were the Petitioner's Sixth Amendment Right to Confrontation and Right to Present a Defense violated by the court's ruling precluding defense counsel from fully cross-examining Robert Reynolds?

PARTIES TO THE PROCEEDING

Other than the present Petitioner and Respondent, there were no parties in the proceedings in the Wisconsin Supreme Court whose judgment is sought to be reviewed.

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OPINIONS BELOW

The order of the Wisconsin Supreme Court denying the Petition for Review is unreported. That order is reprinted at Appendix A (App. 1a) to this Petition.

The decision of the Wisconsin Court of Appeals, which affirmed the order of the circuit court was unreported. That decision is reprinted at Appendix B (App. 1b-13b) to this Petition.

JURISDICTION

The order of the Wisconsin Supreme Court denying permissive review was entered on May 7, 1996. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV.

This petition also concerns the construction and application of the Due Process Clause of the Fifth Amendment to the United States Constitution which provides:

> No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. V.

This petition also concerns the construction and application of the Compulsory Process and Confrontation Clauses of the Sixth Amendment to the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

Bentura Martinez was charged with eight counts of first degree sexual assault, one count of armed robbery and one count of burglary. (R. 30:3). At trial, Mr. Martinez presented an alibi defense. (R. 34:159). The jury found him guilty of all the charges. (R. 36:3).

I. Factual Summary Of The Alibi Defense Presented By Bentura Martinez:

On April 23, 1994, shortly after six o'clock in the evening, Bentura Martinez left the house of a family friend and visited a local tavern called Anthony's Pub located on the south side of the City of Milwaukee. (R. 34:156). At Anthony's Pub, Bentura Martinez drank alcoholic beverages and left around seven thirty in the evening. (R. 34:157). After leaving Anthony's Pub, Mr. Martinez went to another tavern called Mi Cantina to look for some friends he was supposed to meet. (R. 34:157). Bentura Martinez had some more drinks at Mi Cantina and returned to Anthony's Pub in a car driven by Ernesto Cervera. (R. 34:157).

At Anthony's Pub, Bentura Martinez consumed more alcoholic beverages until it was closing time at the bar. (R. 34:158). Mr. Martinez was one of the last people to leave the bar. (R. 34:158).

According to the bartender at Anthony's Pub, the bar closes a few minutes before 2:30 a.m. on weekend nights, which is the legal closing time on weekends. (R. 34:122). Bentura Martinez was in Anthony's Pub until just prior to 2:30 a.m. (R. 34:122). After leaving Anthony's Pub, Bentura Martinez went straight to his father's house to sleep until the morning when he would attend the first communion of his daughter, Jessica Marie Martinez. (R. 34:158).

Waldo Martinez, Bentura's father, testified that at about 2:30 in the morning of April 24, 1994, he let his son into his house. (R. 34:136-137). Bentura Martinez went to sleep on the couch in the downstairs of his parent's home. (R. 34:159). Waldo Martinez testified that these events were clear in his mind because the next morning was the Sunday of his granddaughter's First Communion. (R. 34:136).

II. Statement Of Facts According To The Alleged Victims, Robert Reynolds and Mary Stewart.

Robert Reynolds testified that on the evening of April 23, 1994, he and his then girlfriend Mary Stewart returned to Reynolds' home from a movie theater and restaurant around 12:30 in the morning. (R. 31:77). Robert Reynolds and Mary Stewart had sexual intercourse twice soon after they returned home and then went to sleep in Mr. Reynolds' bed. (R. 31:79).

A few hours later they were awakened in Robert Reynolds' darkened bedroom by a man who was threatening them with a gun. (R. 31:80-81). The assailant told Mr. Reynolds to look down. (R. 31:89). The assailant performed multiple sex acts to Mary Stewart without her consent and by use of force. (R. 30:52).

After this sexual attack, the assailant questioned Robert Reynolds concerning the opening of the safe located in the bedroom closet. (R. 30:64). Moments later the assailant hit Mr. Reynolds in the back of the head with the gun and grabbed his wallet containing one hundred and twenty dollars from a pair of

shorts. (R. 30:63-64). The assailant forced Mr. Reynolds to open the safe in the closet. (R. 30:64-65). The attacker took another seven hundred dollars from the safe. (R. 31:98).

Mary Stewart and Robert Reynolds went to a friend's home. (R. 31:102). While Robert Reynolds stayed there, Mary Stewart left immediately for her home in Indiana. (R. 31:102). While in Indiana, she talked to law enforcement officials who reported the incident to the Milwaukee Police Department. (R. 31:63). Mary Stewart testified that she had never seen the attacker before and described him as an overweight Hispanic male in his twenties with an accent. (R. 31:54).

Robert Reynolds was contacted by the Milwaukee Police Department with respect to the identification of the assailant. (R. 27:34). He described the assailant as a man he knew as "Benny". (R. 27:36). Robert Reynolds looked through a drawer of photographs containing pictures of Caucasian and Hispanic males born in the 1960's. (R. 27:53). After looking through several photographs, Mr. Reynolds located the picture of Bentura Martinez. (R.

27:68). The police then used the photo of Bentura Martinez in a four person photo array, in which Bentura was the only Hispanic male. (R. 27:5, 27:26-28). This photo array was shown to Mary Stewart and she picked Bentura Martinez' photograph as being that of the assailant. (R. 27:6). Defense counsel filed a Motion to Suppress the photo array containing four people including the petitioner and all subsequent identification procedures as they were unnecessarily suggestive and unreliable. (R. 27). The trial court held a hearing and ruled the evidence admissible. (R. 27). Bentura Martinez appealed that decision to both the Wisconsin Court of Appeals and to the Wisconsin Supreme Court.

Bentura Martinez had never met Mary Stewart and had only twice met the victim Robert Reynolds. (R. 34:162-164). Bentura Martinez met Robert Reynolds through his cousin Ramone. (R. 34:162). The first time they met was at a cookout. (R. 34:162). The second time they met was at Robert Reynold's home. (R. 34:163). Bentura Martinez was delivering stereo speakers to Robert Reynolds with Ramone

and two other men. (R. 34:163). Bentura was there to help move the speakers into Reynolds' apartment. (R. 34:163).

While in the home of Robert Reynolds, Bentura Martinez and the others present were offered marijuana and other illegal drugs by Reynolds. (R. 34:164). Bentura Martinez observed a very large quantity of marijuana and other drugs in the possession of Mr. Reynolds. (R. 34:164). Shortly thereafter, Bentura Martinez left the home of Mr. Reynolds and has since been in the presence of neither Robert Reynolds nor Mary Stewart. (R. 27:12, 27:41). The trial court did not allow defense counsel to fully cross-examine Robert Reynolds regarding his drug dealing activities. (R. 34:163). The trial court precluded cross-examination of Robert Reynolds regarding the origin of a hair found on the sheets taken from his bed which did not match the petitioner. (R. 34:46). Counsel objected at trial and argued that the petitioner's sixth amendment right to confrontation and right to present a defense were violated by the exclusion of this testimony. (R. 34). Bentura Martinez appealed the trial

court's rulings to the Wisconsin Court of Appeals and to the Wisconsin Supreme Court.

The Police Department conducted one lineup after the apprehension of the main suspect, Bentura Martinez. This lineup, which took place a number of months after the incident, was viewed by both Mary Stewart and Robert Reynolds. (R. 27:88). The participants in the lineup consisted of four people, one of which was the defendant Bentura Martinez. (R. 27:85). Of the four participants, **only Bentura had a pronounced tattoo** showing which was conspicuously sprawled across the length of his forearm. (R. 27:101-102). Despite defense counsels objections, the participants were forbidden to wear long sleeved shirts to hide their arms. (R. 27:101). One of the four participants was nearly **four inches shorter, eight years younger and about 65 pounds lighter** than Bentura. (R. 27:26-28). The second of the four participants was almost **40 pounds lighter** than Bentura Martinez. (R. 27:26-28). Defense counsel challenged the line up in a Motion to Suppress Evidence and in a subsequent hearing. The

trial court's rulings were appealed to both Wisconsin Appellate courts.

The lineup was conducted with Mary Stewart and Robert Reynolds observing from a room on the other side of a one way window. (R. 27:75-76). Mary Stewart identified Bentura Martinez and said she was only **80% certain** that he was the assailant. (R. 27:10). Robert Reynolds also identified Bentura Martinez. (R. 27:40). Bentura Martinez was subsequently arrested for the assaults, burglary and armed robbery. (R. 33:50).

Martinez timely petitioned the Wisconsin Supreme Court for review on April 3, 1996. The Wisconsin Supreme Court denied that petition without comment on May 7, 1996. (App. 1a).

REASONS FOR ALLOWANCE OF THE WRIT

I. THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S DECISION TO ADMIT IMPERMISSIBLY SUGGESTIVE IDENTIFICATION EVIDENCE OF BENTURA MARTINEZ.

Both the Wisconsin Court of Appeals and the Wisconsin Supreme Court affirmed the trial court's decision to admit identification evidence at trial where the identification procedures were impermissibly suggestive and unreliable under the totality of the circumstances. This Court should grant review of this issue as it presents an important federal question and the petitioner's constitutional due process rights under the 5th and 14th Amendments to the United States Constitution have been violated.

A. All of the Identification Procedures were Unnecessarily Suggestive and Conducive to Irreparable Mistaken Identification as to Deny the Petitioner Due Process of Law.

There were a number of identification procedures used to identify Bentura

Martinez and all of them were preceded by an unnecessarily suggestive photo array where Bentura Martinez was the only Hispanic male. The fact that the first identification procedure for Mary Stewart was so incredibly flawed, tainted any and all subsequent identifications made by Mary Stewart. The issue arises again with the subsequent lineup where the issue is Mary Stewart's description of the participants. The fact that the Wisconsin court's have held that the subsequent lineup was not impermissibly suggestive does not give license to the police to engage in unconstitutional racially motivated identification procedures. Therefore, this Court must review whether or not a photo array, for which the only Hispanic male is the defendant, violates the petitioner's rights of due process of law.

"[I]dentification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law." Foster v. California, 394 U.S. 440, 443 n.2 (1969) *citing* Stovall v. Denno, 388 U.S. 293, 302 (1967). The identification

procedures used in the petitioner's case were so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the petitioner due process of law.

1. Mary Stewart's initial description of her assailant was unreliable.

Mary Stewart gave an initial description of her assailant to the Indiana State Patrol. (R. 31:54). In that description, she stated that her assailant was "Mexican or Hispanic", had "facial hair" and was "overweight". (R. 31:54). Her description did not include any mention of a large tattoo -- or any tattoo, including the Blessed Virgin Mary -- on her assailant's body. (R. 31:54). Martinez has a very large tattoo along the entire length of his forearm. (R. 27:98, 34:165). The tattoo, in florescent colors, depicts the Blessed Virgin Mary, with an angel hovering at the bottom. (R. 27:98, 34:165). Mary Stewart mentioned nothing about the Blessed Virgin Mary or the angel.

Both the Wisconsin court of appeals

and the Wisconsin Supreme Court have held that a tattoo is an important identifying characteristic. State v. Haynes, 118 Wis. 2d 21, 345 N.W.2d 892 (Ct. App. 1984); State v. Mosely, 102 Wis. 2d 636, 307 N.W.2d 200 (1981). However, the Wisconsin courts ignored Mary Stewart's significant omission in this case. Because she failed to identify a significant and important identifying characteristic of the petitioner, Mary Stewart's description of her assailant was inaccurate, incredulous and unreliable as applied to the petitioner. All subsequent identification procedures based on this description should have been excluded.

2. The photo array shown to Mary Stewart was tainted as Bentura Martinez was the only Hispanic male in the photo array.

Mary Stewart was shown a photo array which contained four photos. Of those four photos, Mary Stewart testified that only one looked Hispanic to her. (R. 27:26-28). In her previous description of her assailant, Mary Stewart stated that he was "Mexican or Hispanic". (R. 31:54).

Therefore, having only one Hispanic in the photo array and that photo depicting the petitioner, is unnecessarily suggestive and contrary to the interest of justice.

The standard for the admissibility of an out-of-court identification of an accused is whether there is a substantial likelihood of misidentification. Neil v. Biggers, 409 U.S. 188, 198 (1972). The photo array which contained only one Hispanic male created a substantial likelihood of misidentification -- especially when the witness has previously described her assailant as Hispanic. The photo of Bentura Martinez was unique in a manner directly related to an important identification factor -- race -- and the photo array was unnecessarily suggestive. *See* Foster, 394 U.S. 440 (1969), Stovall, 388 U.S. 293 (1967).

The Wisconsin court of appeals found that there was "no evidence in the record . . . that Martinez was the only Hispanic male in the photo array." (App. 6b). "The only evidence regarding this issue is the victim's statement that the other three men in the photo array did not look Hispanic to her." (App. 6b). It doesn't

matter if the men in the photo array were Hispanic or not -- **what matters is the victims perception**. That a reviewing court later ascertains that the men in the lineup may or may not have been Hispanic does not matter, it is what the person viewing the photo array believes that matters.

Mary Stewart stated that her assailant was Hispanic. She also stated that the only person in the photo array who looked Hispanic to her was the petitioner. Therefore, the photo array was unnecessarily suggestive and should have been excluded. By affirming the trial court's decision, the Wisconsin courts have violated the petitioner's due process rights under the 5th and 14th Amendments to the United States Constitution. Therefore, this Court should grant the Petition for Writ of Certiorari.

3. The lineup procedures conducted by the Milwaukee Police Department were Impermissibly Suggestive.

Subsequent to the impermissibly

suggestive photo array, a lineup was conducted. The lineup consisted of four Hispanic men, one of which was Bentura Martinez. All the men were clean-shaven and dressed in jail clothes. One of the four participants, Juan Casarez, was six years younger, nearly four inches shorter, and sixty-five pounds lighter than Bentura Martinez. (R. 27:26-28, 31:9). Another participant in the lineup was Joaquin Tinajero who was forty pounds lighter than Bentura Martinez. (R. 27:26-28, 31:9). The third participant was similar in height and weight to Bentura Martinez. (R. 27:26-28, 31:9). If Mary Stewart had been blindfolded, there was a 50% chance that the result of the lineup would have been the same.

The first participant, Juan Casarez, did not match the description given by Mary Stewart. Mary Stewart described her assailant as 5'10" and overweight. (R. 27:26-28, 31:9). Mr. Casarez was 5'5" and 156 pounds. The second participant, Joaquin Tinajero, was forty pounds lighter then Mr. Martinez. He did not fit the description of an "overweight" male as well.

The Wisconsin court of appeals stated that "[p]hysical differences in participants do not make a lineup suggestive." *See* Powell v. State, 86 Wis. 2d 51, 67, 271 N.W.2d 610, 618 (1978). And that the "lineup need only be reasonably fair." Id. This lineup was not "reasonably fair" as there was no physical similarity between the participants and it followed the photo array which contained only one Hispanic male -- the petitioner. The issue of the seriatim impact of multiple flawed identification procedures was not addressed by the Wisconsin appellate courts. Taken separately and together, the identification procedures employed here are unreasonable and unfair.

When a lineup is conducted in an unnecessarily suggestive manner and conducive to misidentification then there is a denial of due process of law. Stovall v. Denno, 388 U.S. 293, 302 (1967). A conviction **must** be overturned in situations where identification procedures were found to be impermissibly suggestive and likely to lead to misidentification. Biggers, 409 U.S. at

198 n. 5 (emphasis added). The Wisconsin appellate courts, in affirming the trial court's decisions have violated the petitioners right to due process of law under both the 5th and 14th Amendments to the United States Constitution and his conviction must be overturned by this Court.

The complainant was raped in a dark room late at night. (R. 27:13). The complainant gave a description to the Indiana State Patrol that failed to mention the striking tattoo covering the Petitioner's forearm. (R. 27:98). The complainant viewed a photo array for which the witness believed the **Petitioner was the only person of Hispanic origin.** (R. 27:26-28). The complainant viewed a lineup which was so impermissibly suggestive that she could have randomly identified the petitioner 50% of the time. (R. 27:98). The petitioner's due process rights as guaranteed by the 5th and 14th Amendments to the United States Constitution were violated under the totality of the circumstances as it related to the pre-trial identification procedures of Bentura Martinez.

For the above reasons, this court should grant review of this issue as it presents a federal constitutional question in conflict with relevant United States Supreme Court decisions. *See* SUP. CT. R. 10.

II. THE PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONTATION AND RIGHT TO PRESENT A DEFENSE WERE VIOLATED WHEN THE TRIAL COURT PRECLUDED DEFENSE COUNSEL FROM FULLY CROSS-EXAMINING ROBERT REYNOLDS.

The trial court precluded defense counsel from cross-examining Robert Reynolds regarding his drug dealing activities. Defense counsel was also precluded from questioning Reynolds about an African-American hair which was found on his bed that, combined with the identification, may have raised reasonable doubt as to a different perpetrator.

The exclusion of this testimony violated the petitioner's right to confrontation and right to present his theory of defense under the sixth Amendment to the United States Constitution. This Court should review

these issues as they present questions of federal constitutional law.

A. The Evidence of Robert Reynold's Drug Dealing Activities was Relevant to his Motive to Inculpate Bentura Martinez.

The Wisconsin court of appeals held that the evidence of Robert Reynolds drug dealing activities was irrelevant and therefore properly excluded by the trial court. (App. 10b). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Wis. Stat. sec. 904.01. On cross-examination, the proper test "is not whether the answer sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." State v. Lindh, 161 Wis. 2d 324, 348, 468 N.W.2d 168, 176 (1991).

Robert Reynolds was a dope dealer.

(R. 34:163). There was testimony that prior to the assault, Bentura Martinez observed drugs in Robert Reynolds home therefore making him a potential witness against Robert Reynolds in a drug prosecution. (R. 34:163). Defense counsel, by introducing this evidence, was attempting to show the jury the motivation behind Robert Reynolds fabricated, inculpatory testimony regarding the identity of the assailant as Bentura Martinez to hide his drug dealing activities for which Martinez was a witness.

The evidence should have been admitted as it was relevant to the credibility of the witness and his motive for falsifying evidence.

B. The Trial Court Improperly Precluded Defense Counsel from Questioning Reynolds About an African-American hair which was found on the Bed Sheet.

The main issue in this case was one of identification. Bentura Martinez has consistently asserted that he did not commit these crimes. The bed sheet which

was on Robert Reynolds' bed on the night of the assault was tested by both state and defense experts at their respective laboratories. (R. 34:41, 34:46). Defense expert Dr. Siegesmund testified that he found a hair on the bed sheet that could not have come from Mary Stewart, Robert Reynolds or the petitioner Bentura Martinez. (R. 34:46). Dr. Siegesmund determined that the hair possessed such qualities that it was shed from the body of an African-American. (R. 34:46). Mary Stewart, Robert Reynolds and Bentura Martinez were excluded as the donor of the hair as none of them are African-American. The cross-examination of Robert Reynolds regarding the donor of this hair was relevant. Evidence of another possible assailant makes the existence of a fact of consequence, the identity of Bentura Martinez as the assailant, less probable. Therefore, it was relevant to shed light on a possible perpetrator other then Bentura Martinez. Because Robert Reynolds was not allowed to answer the question, the identification of Bentura Martinez became a certainty.

The Wisconsin appellate courts

dismissed this evidence as irrelevant and stated that there "was no evidence presented to the trial court that the assailant was an African-American male." (App. 11b). This is false. There was evidence presented that a hair was found on the bed sheet that did not match either the complaining witnesses or the petitioner. Further, the identification procedures were sufficiently flawed so that it is plausible that Mary Stewart was referring to a light skinned African-American male with an accent instead of an Hispanic male. This hair belonged to an African-American person. If the defense had been allowed to question Robert Reynolds regarding the hair, there would have been evidence produced that the assailant could possibly have been African-American. This evidence would have supported the petitioner's assertion that he was not the assailant and was improperly identified. This evidence was relevant and the Wisconsin courts erred when it affirmed the trial court's decision to exclude it.

C. The Exclusion of this Evidence Violated the Petitioner's Right to Confrontation and Right to Present a Defense.

The right to confront witnesses against a defendant is a fundamental right and fully embraces the right to cross-examine those witnesses. *See* Chambers v. Mississippi, 410 U.S. 284 (1973). The trial court limited the defenses ability to cross-examine one of the complaining witnesses. This limitation violated the petitioner's right to confrontation.

The trial court does have broad discretion to limit the scope of cross-examination. State v. Lindh, 161 Wis. 2d 324, 348, 468 N.W.2d 168, 176 (1991). However, the court has the ability to reverse the trial court's limitation if the ruling represented an erroneous exercise of discretion. Id. at 348-349, 468 N.W.2d at 176. The trial court erroneously exercised its discretion when it precluded this evidence. The evidence was relevant not only to the main issue of the case -- identification -- but was also relevant to the credibility of the

witnesses.

Therefore, this Court should grant review of these issues as they present a federal constitutional question and the trial court's erroneous decision violated the petitioner's sixth amendment right to confrontation and right to present a defense.

CONCLUSION

For the reasons stated the petition should be granted.

Dated at Milwaukee, Wisconsin, July 31, 1996.

Respectfully submitted,

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APPENDIX A

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 95-1836-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENTURA MARTINEZ,

Defendant-Appellant.

May 7, 1996

A petition for review pursuant to Wis. Stat. sec. 808.10 having been filed on behalf of defendant-appellant-petitioner, Bentura Martinez, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

APPENDIX B

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 95-1836-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENTURA MARTINEZ,

Defendant-Appellant.

March 5, 1996

APPEAL from a judgment of the circuit for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Bentura Martinez appeals from a judgment of conviction for eight

counts of first-degree assault, one count of armed robbery, and one count of burglary. *See* sec. 940.2251(1)(b), 943.10(1)(a) & (2)(a) and 943.32(1)(a) & (2), STATS.

On appeal, Martinez argues that: (1) the procedures used to identify him were impermissibly suggestive and unreliable and should have been excluded from evidence; (2) his right to confrontation and his right to present a defense were violated when the trial court precluded his full examination of a witness; and (3) the trial court submitted an unconstitutional flight instruction. We affirm.

At trial, Martinez testified that on April 23, 1994, around 6:00 p.m., he left the home of a family friend to visit a local tavern. He consumed a few alcoholic beverages at the tavern and left at approximately 7:30 p.m. for another tavern, staying there until approximately

2:30 a.m. He then went to his father's home to get some sleep.

The victim's boyfriend, Robert Reynolds, stated that on that same evening, he and the victim returned to his home at 12:30 a.m. and eventually went to sleep A few hours later, they were awakened in Reynolds's bedroom by a man with a gun, later identified as Martinez. Reynolds was told to "look down" while Martinez sexually assaulted the victim. After the sexual assaults, Martinez physically assaulted Reynolds, taking his wallet and forcing him to open a closet safe where he took approximately $700. Martinez then left.

The victim testified that she had never seen Martinez before. The victim described Martinez as an overweight Hispanic male in his twenties. Reynolds, who had met Martinez previously, identified Martinez after looking at fifty or sixty photographs. The photograph selected by Reynolds was then placed with three others for the sexual-assault victim

to view. From the four pictures, she chose Martinez as her assailant. Thereafter, the police department conducted a lineup that was viewed by both Reynolds and the victim. The lineup consisted of four Hispanic males, including Martinez. At the time of the lineup, Martinez was twenty-six years old, stood five feet eight and weighed 220 pounds. The other three men were: (1) twenty-four years old, five feet eight and 230 pounds; (2) twenty-four years old, five feet eight and 180 pounds; and (3) eighteen years old, five feet five and 156 pounds. Both the victim and Reynolds again identified Martinez as the assailant at the lineup. At trial, Martinez moved for the suppression of the identification testimony, alleging that the procedures used were unduly suggestive. The trial court denied the motion. A jury subsequently convicted Martinez of the sexual assaults, burglary and robbery.

Martinez argues that the procedures used to identify him were impermissibly

suggestive and unreliable and should have been excluded from evidence by the trial court. On appeal, a challenge to the suggestiveness of identification procedures raises an issue of law that we review *de novo*. ***State v. Wilson,*** 179 Wis.2d 660, 682, 508 N.W.2d 44, 52-53 (Ct. App. 1993), *cert. denied*, 115 S. Ct. 100, 130 L.Ed.2d 48 (1994). We accept a trial court's findings of fact as true unless the are clearly erroneous. ***Id.***, 179 Wis.2d at 682-683, 508 N.W.2d at 53. When examining a challenge to pre-trial identification procedures, we initially decide if the procedures were characterized by "unnecessary suggestiveness." ***Fells v. State***, 65 Wis.2d 525, 537, 223 N.W.2d 507, 514 (1974). If such a situation exists, we must then determine whether "despite the unnecessary suggestiveness, the 'totality of the circumstances' show that the identification was nevertheless reliable." **Id.**

The defendant has the burden to prove

that the identification procedures were impermissibly suggestive. ***State v. Mosley***, 102 Wis.2d 636, 652, 307 N.W.2d 200, 210 (1981). If the defendant fails to meet this burden, the inquiry is at an end and the evidence is admissible. ***Id.***

In this case, both the photo array and the lineup were not unduly suggestive. As noted, Reynolds picked out a picture of Martinez after viewing fifty or sixty photographs. The police then showed that picture along with three others to the victim. Martinez argues that the photo array shown to the victim was suggestive because he was the only Hispanic depicted. There is no evidence in the record, however, that Martinez was the only Hispanic in the photo array. The only evidence regarding this issue is the victim's statement that the other three men in the photo array did not look Hispanic to her. Further, all the photo array participants reasonably resembled Martinez in almost all physical characteristics, including that they all

had beards.

The lineup procedure used four participants, all clean-shaven Hispanic men dressed in identical jail clothes. Martinez, too, was clean-shaven. Martinez argues that the lineup was impermissibly suggestive due to the differences in age, height, and weight between him and the other participants. Physical differences in participants in a lineup do not make a lineup suggestive. *See* ***Powell v. State***, 86 Wis.2d 51, 67, 271 N.W.2d 610, 618 (1978). The lineup need only be reasonably fair. ***Id.*** The law does not require that lineups shown to witnesses include near identical or look-alikes of the witness descriptions. The trial court must look to the totality of the circumstances surrounding the identification to determine whether due process was violated. ***Stovall v. Denno***, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972, 18 L.Ed.2d 1199, 1206 (1967).

All the lineup participants were

Hispanic men around the same age. One participant was almost the identical weight and height as Martinez. The remaining two were slightly shorter and lighter. Again, dissimilarities between individuals composing a lineup, standing alone, are insufficient to establish impermissible suggestiveness. As observed in ***U.S. v. Lewis***, 547 F.2d, 1030, 1035 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111, 97 S. Ct. 1149, 51 L.Ed.2d 566 (1977), "[p]olice stations are not theatrical casting offices; a reasonable effort to harmonize the lineup is normally all that is required." Martinez also argues that his lineup was suggestive because he has a tattoo on his arm that was exposed during the lineup. The police conducting the lineup made certain that the arms and hands of all the men in the lineup were held behind their backs. The tattoo on Martinez's arm, however, was briefly exposed. Martinez offers no proof that this made the lineup unduly suggestive. There was no evidence that the victim ever saw or was aware of the

tattoo before viewing Martinez in the lineup. As noted, Martinez bears the burden of showing that the photographs and lineup were unnecessarily suggestive. Martinez has failed to meet that burden.

Next, Martinez contends that the trial court erroneously limited his cross-examination. Martinez sought to ask Reynolds about his alleged drug dealing activities. Martinez also attempted to elicit evidence relating to the possible presence of an African-American person in Reynold's apartment, in an attempt to argue that somebody else committed the crimes.

Unless otherwise prohibited, relevant evidence is admissible, RULE 904.02, STATS. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." RULE 904.01, STATS. On cross-examination, the proper test "is not whether the answer

sought will elucidate any of the main issues in the case but whether it will be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." ***State v. Lindh***, 161 Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991) (citation omitted). Cross-examination will not be allowed unless there is a reasonable relation between the evidence sought to be introduced and the proposition to be proved. ***Id.***

The scope of cross-examination is a question committed to the broad discretion of the trial court. ***Id.*** This court will reverse a trial court's limitation or prohibition of cross-examination if the ruling represents an erroneous exercise of discretion. ***Id.***, 161 Wis.2d at 348-349, 468 N.W.2d at 176. This court will affirm if a reasonable basis exists for the trial court's ruling. ***Id.***, 161 Wis.2d at 349, 468 N.W.2d at 176.

As noted, Martinez sought to elicit

evidence from Reynolds regarding Reynolds's alleged drug dealing. The trial court excluded this evidence as irrelevant. We agree. Evidence of alleged drug dealing had no tendency to make more or less probable any fact of consequence to the determination of his guilt or innocence. *See* RULE 904.01, STATS.

Martinez further claims that the trial court erroneously excluded questions concerning hair found on Reynolds's bed sheet. Martinez sought to present testimony that a defense expert found two hairs on Reynolds's bed that did not belong to Martinez, Reynolds, or the victim. The defense expert testified that the hair belonged to an African-American of unknown sex. The trial court determined that this line of questioning was irrelevant. We agree. There was no evidence present to the trial court that the assailant was an African-American male.

Finally, Martinez argues that WIS JI--CRIMINAL 172 regarding flight should not have been given because it impermissibly shifted the burden of proof to him to persuade the jury that he did not flee. We disagree. WIS JI--CRIMINAL 172 instructs the jury that if, from the evidence, it finds that the defendant had fled, the jury could consider that fact.[1] Moreover, Martinez waived this issue by failing to object to the instruction at trial. *See* sec. 805.13(3), STATS.;

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[1] WIS JI--CRIMINAL 172 provides:

> Evidence of the conduct or the wherabouts of a person after a crime has been committed or after that person has been accused of crime are circumstances which you may consider along with all the other evidence in determing guilt or innocence. Whether or not evidence of such conduct or whereabouts in this case shows a consciousness of guilt, and whether or not consciousness of guilt shows actual guilt are matters exclusively for you, the jury, to determine and you must consider that there may be many reasons unrelated to guilt for such conduct. You must also consider that feelings of guilt do not necessarily reflect actual guilt.

State v. Marshall, 113 Wis.2d 643, 653, 335 N.W.2d 612, 617 (1983). We do not believe that this is an appropriate case to exercise our power of discretionary review. *See* sec. 752.35, STATS.

By the Court.--Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.